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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 351

ELMER KAELIN, Petitioner

v.

UNIVERSITY OF PITTSBURGH, a corporation; WILLIAM C. FREDERICK, Dean, Graduate School of Business Administration, University of Pittsburgh, and A. C. VAN DUSEN, Vice Chancellor, The Professions, University of Pittsburgh, Respondents

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, University of Pittsburgh, William C. Frederick and A. C. Van Dusen, oppose the Petition for Writ of Certiorari for the reason stated herein.

BASIS FOR JURISDICTION

If this case were one in which a Writ of Certiorari was to be granted, the jurisdiction of this Honorable Court would probably be invoked under the provisions of Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. Does the Fourteenth Amendment to the Constitution of the United States require that Petitioner have his right to be granted a master's degree by the Respondent-University determined in an action in mandamus in the courts of Pennsylvania?

II. Did Petitioner seasonably raise a federal question in the courts of Pennsylvania?

STATEMENT OF THE CASE

Petitioner Elmer Kaelin filed a suit in mandamus in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking to compel the Respondent-University to grant him a master's degree. Respondent filed preliminary objections to the complaint, taking the position *inter alia* that the Court of Common Pleas did not have jursidiction in mandamus in this instance. The trial court overruled the preliminary objections, from which ruling Respondents appealed to the Supreme Court of Pennsylvania. That court held that the preliminary objections were well founded and that under the pleadings, the Court of Common Pleas did not have jurisdiction of the matter in mandamus. (Appendix A of Petition, Page 9, et seq.)

ARGUMENT

I. The Fourteenth Amendment to the Constitution of the United States Does Not Require That Petitioner Have His Right to Be Granted a Master's Degree by Respondent-University Determined in an Action in Mandamus in the Courts of Pennsylvania.

A close reading of the opinion of the Supreme Court of Pennsylvania in this case clearly reveals that that court held only that the claim of Petitioner could not be litigated in a mandamus action. Implicit in that opinion was that a proper remedy is available to Petitioner to have his rights litigated in the premises. All the federal constitution requires is that Petitioner be given his day in court in an atmosphere in which he is afforded a fair hearing. No particular form or method of state procedure or remedy is required. *O'Donnell v. Watson Bros. Transportation Co.*, 183 F. Supp. 577 (N.D. Ill. 1960); *Olesen v. Trust Co. of Chicago*, 245 F. 2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896 (1957); *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151 (1931). The Fourteenth Amendment is concerned with the substance and not with the forms of procedure. It does not guarantee to a citizen of a state any particular form or method of state procedure. *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40 (1926). Petitioner's right to due process has not been violated when he is told that his cause is not well founded in mandamus but he is left to pursue his asserted rights in another procedural form.

II (a). The Supreme Court of Pennsylvania Did Not Have Before It a Federal Question of Substance, and Did Not Rule on the Basis of Any Federal Question.

In the posture this case was presented to the Supreme Court of Pennsylvania, that Court was required merely to decide whether under Pennsylvania law and practice the Plaintiff had a good cause of action in mandamus in view of the pleading filed. In its opinion the Pennsylvania Supreme Court basically held that the relationship between the University of Pittsburgh and Elmer Kaelin was one of a contractual nature, and that the rights and duties arising from that contractual relationship could not be determined in mandamus. In light of this holding it was unnecessary for the Supreme Court of Pennsylvania to rule on the effect of the receipt by the University of Pittsburgh of public funds which Petitioner claims raises a federal question. This court will not grant certiorari nor accept jurisdiction of a case unless it is shown that the state court decision rested solely on a federal ground. *Mental Hygiene Dept. v. Kirchner,* 380 U.S. 194 (1965).

Assuming that certain aspects of the opinion of the Supreme Court of Pennsylvania dealt with a federal question, i.e., the public nature or not of the University of Pittsburgh, this portion of the opinion was independent of the ground for supporting the decision on state law and practice alone. In such a situation, where the state ground for upholding the decision is independent of any purported federal ground, this Court does not have jurisdiction to entertain an appeal. *Jankovich v. Indiana Toll Road Comm'n.,* 379 U.S. 487 (1965).

II (b). No Federal Question Was Seasonably Raised in the State Courts. Therefore Any Such Purported Federal Question Is Not Properly Before This Court.

The record in this case consists of the pleadings filed in the trial court, the orders there entered and the various papers filed in the Supreme Court of Pennsylvania and the opinion of the Supreme Court of Pennsylvania. In none of these papers is a specific federal question of any kind whatsoever raised by Petitioner. He did not aver that any of his rights guaranteed by the federal constitution were violated by the Respondents or by anyone else. The sole reference anywhere to what might be considered a claim of some constitutional question occurs in Petitioner's brief before the Pennsylvania Supreme Court, at page 9, wherein he states:

> "This type of conduct, of course, creates a responsibility [on the part of the Respondent-University] in return, and a serious one at that, including that of due process and requirements of basic administrative fair-play".*

However petitioner does not further pursue any implication from this statement that a federal question is being raised. The vagueness of the statement does not permit it to be construed as a bona fide claim of some deprivation of a federally guaranteed right.

Further, we point out that at no place in the brief before the Supreme Court of Pennsylvania did Petitioner

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*Petitioner's brief before the Supreme Court of Pennsylvania is, of course, not a part of the present record.

raise the possibility that if that court decided as it ultimately did, the Petitioner's federally guaranteed rights would be violated. Indeed, in this respect it can be pointed out that Petitioner has failed to state as required by Supreme Court Rules, Rule 23(f) the stage in the proceedings or the manner in which any federal claim was raised, and how any such reputed claim was passed upon by the state courts. Nothing appears in the Petition which shows that a federal question was timely and properly raised so as to give this Court jurisdiction to review the decision of the Pennsylvania Supreme Court on a writ of certiorari.

By his own admission, Petitioner acknowledged that the questions before the Supreme Court of Pennsylvania were: (1) that the appeal of Respondent-University should be quashed and (2) that the Court of Common Pleas had jurisdiction in mandamus to entertain the suit. Both questions were decided against Petitioner under the law and practice of Pennsylvania.

In Pennsylvania the general rule is that matters which have not been raised in the trial court cannot be raised in appeal to the Supreme Court of Pennsylvania. *Montgomery County Bar Assn. v. Rinalducci,* 329 Pa. 296, 197 Atl. 924 (1938). An exception to this rule is that an *appellee* may raise an argument, not made in the court below, to support a decision in his favor. *Sherwood v. Elgart,* 383 Pa. 110, 117 A.2d 899 (1955). In *Edelman v. California,* 344 U.S. 357 (1953), this Court said, at page 358: "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

Conclusion.

Applying these principles to the instant case, we find that Petitioner did not raise a federal question in the trial court, and that while he might have been permitted to do so on appeal to support the trial court's ruling in his favor he again failed to do so as above pointed out. Therefore any purported claim of a violation of a federally guaranteed right was not "seasonably raised in accordance with the requirements of state law," and the purported claim is not now properly before this Court.

CONCLUSION

The decision of the Supreme Court of Pennsylvania did not violate any constitutional right of Petitioner, in that its decision held only that the procedure Petitioner selected in the lower court was defective. Petitioner did not seasonably raise any federal claim in the State courts and his raising of such a purported claim at this time is too late to invoke the jurisdiction of this Court.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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August 9, 1966